DAVID SMITH RANCHES ET AL. (APPELLANTS), COLORADO-UTE ELECTRIC ASSN., INC. (INTERVENOR)

IBLA 77-432 Decided November 15, 1977

Appeal from decision of the Colorado State Director, Bureau of Land Management (BLM), approving a right-of-way application of the Colorado-Ute Electric Association. C-23562.

Affirmed.

1. Administrative Procedure: Standing -- Grazing Permits and Licenses: Generally

   Holders of grazing permits under sec. 3 of the Taylor Grazing Act whose permits give them grazing rights for public lands which are subsequently traversed by a power line right-of-way grant have standing to appeal the decision granting the right-of-way.

2. Federal Land Policy and Management Act of 1976: Generally -- Regulations: Generally -- Rights-of-Way: Generally

   Sec. 310 of the Federal Land Policy and Management Act of 1976 provides that, prior to promulgation of new regulations, the Secretary will administer the public lands under existing regulations to the extent practical. Issuance of a right-of-way permit for an electrical power transmission line prior to the promulgation of new regulations under sec. 504 of the Act is permissible under the authority in sec. 310.

3. Federal Land Policy and Management Act of 1976: Generally -- Regulations: Generally -- Rights-of-Way: Generally

   The fact that various of the existing regulations in 43 CFR Part 2800, governing

issuance of rights-of-way, are not wholly consistent with the Federal Land Policy and Management Act of 1976 does not render invalid a BLM decision granting a right-of-way under the authority of sec. 310 of that Act.

4. Federal Land Policy and Management Act of 1976: Generally -- Rights-of-Way: Generally

Sec. 505, Federal Land Policy and Management Act of 1976, does not require that preliminary planning considerations be enumerated on the face of a grant of a right-of-way.

5. Federal Land Policy and Management Act of 1976: Generally -- Rights-of-Way: Generally

The third party participation provision of sec. 102(a)(5), Federal Land Policy and Management Act of 1976, is entirely satisfied by a series of public hearings held prior to the grant of a power transmission right-of-way.

APPEARANCES: Henry W. Ipsen, Esq., and Gerald E. Dahl, Esq., of Bermingham, White, Burke & Ipsen, P.C., Denver, Colorado, for appellants; Wallace C. Duncan, Esq., and Phillip A. Chabot, Jr., Esq., of Duncan, Brown, Weinberg & Palmer, Washington, D.C., for Colorado-Ute Electric Assn., Inc.; Lowell L. Madsen, Esq., Office of the Solicitor, United States Department of the Interior, Denver, Colorado, for the United States.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

David Smith Ranches, Inc., Duane P. Ottosen, Phillip O. Jensen, and Jacobs Land and Livestock Corporation appeal from decisions of the Colorado State Office, Bureau of Land Management (BLM), dated May 20 and May 31, 1977, granting to the Colorado-Ute Electric Assn., Inc. (intervenor), right-of-way C-23562 for an electric power transmission line over certain public lands in Rio Blanco County, Colorado.

On February 10, 1976, the Colorado-Ute Electric Assn. (Colorado-Ute), applied to the Colorado State Office, BLM, for a right-of-way across public lands in Rio Blanco, Moffat, and Garfield Counties, Colorado. The application, C 23562, was for a right-of-way to accommodate a 345 kv transmission line, hereinafter referred to

as the Craig-to-Rifle line. On March 30, 1976, the Colorado State Office began to develop an Environmental Analysis Record (EAR) to determine whether an Environmental Impact Statement (EIS) would be a necessary prerequisite to BLM action respecting the Craig-to-Rifle application. Thereafter, on April 23, 1976, Colorado-Ute presented BLM with the EIS and final impact statement for the Yampa Project which had been prepared by the Rural Electrification Administration (REA). It included an environmental study of the Craig-to-Rifle transmission line. On April 27, 1976, the Colorado State Director, BLM, wrote to the attorneys for appellants, informing them that the EIS by REA for the Yampa Project was fully responsive to the environmental issues raised by the Craig-to-Rifle application, that the issues raised by the environmental analysis would be addressed by stipulations in the lease, and that BLM saw no further need for environmental processing in connection with intervenor's application.

On May 7, 1976, counsel for appellants, joined by various other residents of Rio Blanco County, requested that the State Director hold hearings in Meeker, Colorado, on the specific issue of the Craig-to-Rifle line. Appellants expressed dissatisfaction with the BLM decision that the Yampa Project EIS adequately addressed the Craig-to-Rifle application environmental issues, and alleged that the transmission line project was the subject of "substantial controversy." Appellants restated their objections in a July 15, 1976, letter to BLM, and again requested that a public hearing be held on the right-of-way application. The State Director replied, requesting appellants to schedule an appointment for a personal interview concerning these objections and requests. Although a meeting was scheduled for September 23, 1976, counsel for appellants canceled. The record does not reflect any meeting thereafter between the State Director and appellants' counsel. In any event, no hearings were held by BLM in response to appellants' requests, although BLM called attention to the fact that REA had, in fact, held hearings regarding the entire Yampa Project including the Craig-to-Rifle line, and appellants, though present, had failed to offer comment at those hearings.

On May 3, 1976, the Board of County Commissioners for Rio Blanco County granted Colorado-Ute a conditional use permit for construction of the Craig-to-Rifle line. Similar action had been taken in 1975 by the Garfield and Moffat County Boards. On January 20, 1977, in a Petition in Condemnation styled Colorado Ute Electric Assn. v. David Smith Ranches, et al., Civil No. 2147, etc., the District Court for Rio Blanco County issued an order which found, "that it is essential that said (Craig-to-Rifle) transmission line be constructed as soon as possible," and

ORDERED, that upon compliance by this petitioner with the following:

> 1. The deposit with the Clerk of this Court for the use of the respondents of an amount of money to be determined by the highest of petitioner's two appraisals, together with copies of such appraisals; and
>
> 2. Upon the petitioner obtaining a grant of a right of way from the Bureau of Land Management for the construction of a 345 kv transmission line from Craig, Colorado to Rifle, Colorado across said agencies administered lands in Moffat, Rio Blanco and Garfield counties, State of Colorado; and
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> 3. Upon the filing with this Court by the petitioner of a certificate stating that it has funds available to commence construction of said line;
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> the said petitioner is authorized to take immediate possession of the tracts of land sought to be condemned in this action belonging to respondents and described in the petition in condemnation, * * *.

On November 29, 1976, some 2 months prior to the above-described order, appellants wrote to BLM noting the recent passage of the Federal Land Policy Management Act of 1976, (FLPMA) P.L. 94-579, 90 Stat. 274, 43 U.S.C. § 1701 et seq., and noting further that section 510(a) (43 U.S.C. § 1770) of the Act made all pending right-of-way applications subject to the provisions of that law. Appellants suggested, in addition, that section 504(e) (43 U.S.C. § 1764), which directed the Secretary to develop new regulations to govern the issuance of right-of-way permits, precluded further action on Colorado-Ute's application until such time as the aforementioned new regulations were developed. On December 30, 1976, BLM informed appellants that pending right-of-way applications would be processed under existing regulations in conformity with the requirements of FLPMA. Quoting a bureau-wide guidance memo, Organic Act Directive, No. 76-15, December 14, 1976, the Colorado State Director called appellants' attention to the language of section 310, FLPMA (43 U.S.C. § 1740), stating that, "Prior to the promulgation of such rules and regulations, such lands shall be administered under existing rules and regulations concerning such lands to the extent practical." BLM subsequently requested additional information from Colorado-Ute concerning its application, such information being necessary for compliance with the right-of-way requirements imposed by FLPMA. By letter of January 11, 1977, appellants protested the BLM decision to continue processing of the Colorado-Ute application, but the Bureau, on May 20, 1977, issued a decision granting the right-of-way under authority of Title V, FLPMA, and the regulations contained in 43 CFR Part 2800. The grant was for a period of 30 years. On May 31, 1977, BLM issued an amended decision making several technical amendments to the special stipulations of the initial grant,

and conforming the stipulations to those earlier agreed upon by BLM and Colorado-Ute. Appellants take their appeal from both of these decisions.

The Board, in response to a motion from Colorado-Ute and supported by BLM but opposed by appellants, granted an exception under 43 CFR 4.21(a) and by Order dated August 11, 1977, declared the State Director's decision granting right-of-way C-23562 to be in full force and effect immediately, notwithstanding the appeal herein. A request by appellants for reconsideration of the exception was denied by the Board on August 31, 1977.

[1] Colorado-Ute, in its request for an exception to the general rule that an appeal to this Board stays the effect of a BLM decision, alleges that appellants lack standing to pursue this appeal. The pertinent regulation, 43 CFR 4.410 (1976), states in relevant part that, "any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management or of an administrative law judge, shall have a right to appeal to the Board." Although appellants made an effort to participate as a party in the proceedings before the State Director, this fact alone is not sufficient to confer standing. As the United States Supreme Court held in Sierra Club v. Morton, 405 U.S. 727 (1971), the doctrine of standing seeks to "serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome." That same goal is reflected in the departmental requirement (supra) that only parties who are "adversely affected by a decision" shall have a right of appeal to this Board.

Appellants, in support of their right to appeal, claim a violation by agency action of their substantive and procedural rights under a specific statute, FLPMA, supra. Under the test of Data Processing Service v. Camp, 397 U.S. 150 (1970), and Barlow v. Collins, 397 U.S. 159 (1970), a party has standing where he alleges that there is both an "injury in fact," and that the alleged injury was to an interest "arguably within the zone of interest protected" by the statute at issue. We find that appellants have here alleged an injury in fact, in that the contested right-of-way traverses public lands on which the appellants variously hold grazing permits under section 3 of the Taylor Grazing Act. 43 U.S.C. § 315(b) (1970). We also note appellants' contentions that the transmission line will interfere with aerial spraying of crops on their adjacent private lands. That these concerns are "arguably within the zone of interest protected" by FLPMA is self evident, 1/ and this appeal

1/ Even if appellants lacked standing under 43 CFR 4.410, they could file a protest under 43 CFR 4.450-2, and appeal any adverse decision by the State Director. The strong public interest in a speedy resolution of this case argues against such a procedure.

cannot, therefore, be dismissed for lack of standing. Motion by Colorado-Ute to dismiss the appeal is denied.

[2] Appellants, as we state supra, have contended from the outset that the State Director was without authority to act on pending right-of-way applications at the time of his decision granting Colorado-Ute an easement across BLM lands for the Craig-to-Rifle line. This argument finds its justification in the wording of sections 510(a) and 505 of FLPMA (43 U.S.C. §§ 1770, 1765), which, appellants contend, halt the issuance of right-of-way permits by BLM until the Department develops and promulgates new implementing regulations. Section 510(a) provides, in pertinent part:

> Sec. 510(a) Effective on and after the date of approval of this Act, no right-of-way for the purposes listed in this title shall be granted, issued, renewed over, upon, under or through such lands except under and subject to the provisions, limitations, and conditions of this title * * *. Any pending application for a right-of-way under any other law on the effective date of this section shall be considered as an application under this title.

43 U.S.C. § 1765. We agree with appellants that the effect of this section is to make the Craig-to-Rifle application subject to all the provisions of Title V, FLPMA.

Appellants turn next to section 505 of the Act, supra, and cite the following language: "Each right-of-way shall contain -- (a) terms and conditions which will (i) carry out the purposes of this Act and rules and regulations issued thereunder * * *." (Appellants' emphasis.) Appellants argue that the language of this section is mandatory in character and requires that the terms and conditions of new rights-of-way permits cannot be drafted until such time as the "purposes of this Act" are reflected in new regulations. They argue further that section 504(e) (43 U.S.C. § 1764) re-enforces the above interpretation by its requirement that, (e) "the Secretary concerned shall issue regulations with respect to the terms and conditions that will be included in rights-of-way pursuant to section 505 of this title." (Appellants' emphasis.) While there is an attractive semantic gloss to this reasoning, appellants' reading of these three sections is not at all consonant with the legislative purposes inherent in FLPMA, for appellants neglect to consider the sections in an overall construction of the statute.

In the first place, section 310, FLPMA, supra, which appellants unsuccessfully attempt to distinguish, provides specifically for the temporary continuation of the existing regulations:

> Sec. 310. The Secretary, with respect to the public lands, shall promulgate rules and regulations to carry out the purposes of this Act and of other laws applicable to the public lands, and the Secretary of Agriculture, with respect to lands within the National Forest System, shall promulgate rules and regulations to carry out the purposes of this Act * * *. Prior to the promulgation of such rules and regulations, such lands shall be administered under existing rules and regulations concerning such lands to the extent practical.

43 U.S.C. § 1740. Appellants state that this section is overridden with respect to rights-of-way, "by the very specific language contained in section 510(a)" (see supra). We disagree with the characterization of the language of section 510(a) as "very specific." At best, it might be said that the wording of that provision could be read as supporting appellants premise. While it is true, as appellants state, that sections 510(a), 504(c), and 505 "address the need for the promulgation of new regulations to fulfill the special terms and conditions imposed by the Act * * *," there is no indication in the Act that these "terms and conditions" cannot be fulfilled by special right-of-way stipulations prior to the issuance of new regulations. This view is supported by the language of section 501(a) (43 U.S.C. § 1761) which states:

> Rights-of-way shall be granted, issued or renewed pursuant to this title under such regulations or stipulations, consistent with the provisions of this title or any other applicable law and shall also be subject to such terms and conditions as the Secretary concerned may prescribe regarding extent, duration, survey, location, construction, maintenance, transfer or assignment, and termination. [Emphasis added.]

We find that the disjunctive "or," instead of "and," is neither accidental nor inconsistent with the language of section 505(a), supra. The "purposes of this Act" referred to in that provision will necessarily be the same as the purposes of the rules and regulations which will ultimately issue thereunder. Moreover, section 510(a) can only be read to vest the Secretary with immediate authority to grant rights-of-way in its statement that the Secretaries of the Interior and of Agriculture "are authorized to grant, issue, or renew rights-of-way over, upon, under or through such lands for * * * (4) systems for generation, transmission, and distribution of electric energy * * *." (Emphasis added.) As appellants correctly state, it is an established rule of statutory construction that when the same statute contains conflicting provisions of both relatively specific and relatively general applicability, the more specific provision will control the matters within its scope. Clifford F. MacEvoy Co. v. United

States, 322 U.S. 102 (1944). However, the conflict which appellants find between Title V and section 310, FLPMA, is largely illusory. These provisions can be read as quite consistent with one another in allowing the issuance of rights-of-way pursuant to FLPMA with appropriate stipulations to carry out the "purposes of this Act" referred to in section 505(a). Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not for the purpose of creating it. Railroad Commission of Wisconsin v. Chicago, B. & Q.R. Co., 257 U.S. 563 (1921). Accordingly, we find that the Colorado State Office, BLM, had proper authority under FLPMA to issue the subject right-of-way. Cf., Four States Television, Inc., 32 IBLA 205 (1977).

[3] Having determined that BLM was vested with the authority to issue the Craig-to-Rifle permit, we turn to appellants' secondary contention, that the existing Bureau of Land Management regulations governing issuance of rights-of-way are inconsistent with FLPMA. We find this contention is without merit. While some of the existing regulations are inevitably in conflict with FLPMA, these regulations have not been applied in the case before us. Organic Act Directive No. 76-15, which outlines the procedures to be followed in exercising the authority conferred on BLM by section 310, FLPMA, discusses the extent to which the present right-of-way regulations are consistent with FLPMA, and the procedure for right-of-way issuance in the absence of valid, comprehensive regulations. We find no instance in the Craig-to-Rifle right-of-way proceedings, of the use of an existing regulation in conflict with the stated policies of FLPMA.

[4] Appellants charge, in more specific terms, that the Craig-to-Rifle permit does not contain all the terms and conditions required by section 505, FLPMA, supra. They protest the fact that various of the subsections of section 505 are not specifically treated on the face of the permit and list a number of the allegedly omitted FLPMA subsections. We find this complaint to be inconsequential, as the environmental concerns which are detailed in these subsections have been identified and resolved in the planning stages of the Craig-to-Rifle line and it would be pointless to require BLM to parrot these preliminary concerns and decisions on the face of the final permit.

Appellants advance several other complaints about the permit which are equally misguided. They state, for instance, that the permit fails to require a plan of operation, a charge which ignores the fact that Colorado-Ute submitted such a plan to BLM more than a year before the issuance of this permit.

Appellants complain that the permit fails to comply with FLPMA requirements for state and local government notification. However, these requirements only apply to conveyances. The right-of-way permit is not a conveyance, but is merely a nonexclusive easement. See section 210, FLPMA (43 U.S.C. § 1720).

[5] Appellants' final allegation of error concerns the alleged failure of BLM to hold a public hearing prior to granting the right-of-way permit, a procedure which appellants see as mandated by section 102(a)(5) of FLPMA (43 U.S.C. § 1701) which provides:

> (5) In administering public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the views of the general public; and to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decision-making.

Appellants argue from this language that it was error for the State Director to grant the subject right-of-way without first holding public hearings, contending that such a conclusion flows from the holding of the Court in Area G Home & Landowners Organization, Inc., v. McVee, Civil No. A-77-64, (D.C. Alaska, April 29, 1977). The Government answered by stating the appellants misplaced their reliance upon Area G because of the distinguishable facts in that case. We Agree.

The Court in Area G stated the limit of its jurisdiction was to determine whether the State Director's decision to grant the right-of-way was reasonable insofar as its environmental impact was concerned. In Area G the State Director concluded no EIS was necessary because the proposed action did not constitute a major federal action affecting the environment, and that the EAR prepared by the BLM District Office was sufficient. However, adequate review of the EAR and meaningful recommendation as to stipulations were not given by the Municipal Planning and Zoning Commission of Anchorage. Then, before special stipulations consonant with the EAR were prepared, the State Director issued the right-of-way permit. Although the Court ruled that a public hearing on the effect of the right-of-way upon the environment should have been held, the Court stated further that such public hearing could have been held by anyone authorized to act: the Planning and Zoning Commission, or any other authorized public agency, or, if none of these, then by the State Director.

In this case a draft and final EIS for the Yampa project, of which the Craigto-Rifle line is a central part, were prepared by the REA in 1974. In connection with the preparation of these studies, REA held public hearings in Loveland and Craig, Colorado, and additional public hearings were held on the project by the Public Utilities Commission of Colorado and the Rio Blanco County Board of County Commissioners. BLM, moreover, held hearings to solicit public comment on its land use ("management framework") plan for Rio Blanco County in 1975, and these latter hearings, held in Meeker, Colorado, included detailed discussions of the right-of-way permit here at issue.

Since all of the appellants were invited to the November 14, 1974, meeting, at which utility corridor plans were discussed, and since two of the appellants did, in fact, attend, it is difficult to understand how appellants might profess any legitimate complaint about the efforts of BLM in assuring the "third party participation" referred to in section 102(a)(5).

We hold that, in its attempt to comply with the letter and spirit of FLPMA, BLM may rely upon public hearings held by other Federal Agencies, State or County agencies, as well as the public meetings of the Bureau held in connection with development of its Management Framework Plans within those sphere of interest the right-of-way flows.

Appellants have requested that this case be assigned to an Administrative Law Judge for a hearing pursuant to 43 CFR 4.415. That regulation provides only for hearings for presentation of evidence upon an issue of fact, and appellants have submitted a list of 12 questions which, they allege, are disputed factual issues. We find that the issues set forth in this list all fall short of being disputed issues of material fact. Most of the issues have been explored exhaustively in the administrative record at the state level and on appeal, including the questions of the extent of public participation allowed by the State Director prior to the issuance of the subject permit, the adequacy of the terms and conditions contained in the permit, and the effect which construction of the line will have upon the livestock, wildlife, land and residents of the area traversed by the line. Various other proposed issues involve determinations respecting the substantive propriety of the State Director's discretionary decision to issue the right-of-way (see questions eight and nine), a purely legal issue which cannot be resolved by a fact hearing. The remainder of the proposed issues, including the question of whether intervenor has all the required permits for the transmission line, and whether it is complying with applicable air and water quality standards, can be determined in the normal course of business by BLM without the assistance of a hearing. We therefore conclude that no dispute over the facts surrounding this appeal has been raised by appellants. A hearing will not be held where there is no dispute as to any material fact and the only questions presented are legal issues, Rachael Topaekok, 23 IBLA 314 (1976); nor is a hearing appropriate when there is no offer of proof which, if established, would impel a different conclusion, Kathryn Eluska, 23 IBLA 284 (1976). The motion for a hearing is denied.

In conclusion, appellants have failed to point out any reversible error in the decision below.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Edward W. Stuebing
Administrative Judge